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THE PRESENT AND FUTURE OF TRADE UNIONS

THERE is likely, for notorious reasons, to be much discussion on this subject in the present Parliament, and probably in this session (1906). Its importance to both capital and labour is, of course, paramount.

In the following pages we hope to set forth succinctly (1) the present law, as we understand it; (2) proposals made for altering the present law, with such comments as occur to us; (3) other suggestions, including our own. Perhaps we may say that the bulk of what follows was written before the appearance of the Report of the Royal Commission on Trade Disputes and Trade Combinations of 1903. We also deal with that. The present position has been reached by legal decisions supported by legal principles, sometimes deemed to be more or less contradictory, which, we fear, are imperfectly understood by many of those—including legislators—on whom the responsibility of amendment, if there is to be amendment, rests.

We do not presume to advocate the objects of any party. We desire to indicate, as lawyers, how any given suggestion which may commend itself, may be legislatively carried out. We assume, of course, that the basis of legislation will be justice, recognising, however, that opinions may honestly differ as to what is just or unjust.

It cannot be denied that in the recent political

"campaign" pledges were freely given to reconsider or revise or amend the law relating to trade unions, and notably that principle of it dealt with in the "Taff Vale Case."

Before 1871.

A word as to this period. From the time trade unions came into notice, probably about the latter part of the eighteenth century—whether they were of masters or of men—till 1871, they were regarded by the law of England as illegal associations, because their objects were, it was thought, necessarily "in restraint of trade." Hence the law could take no cognisance of them in any way: they could (it was universally supposed) neither sue nor be sued, their contracts were not enforceable, their agents and servants could (and did) rob them with impunity, for there was no person of whom the law would take account, there was no one to begin a prosecution; bankers or others entrusted with their property could refuse to restore it. In 1868 and 1869 two Acts were respectively passed to protect the funds of unions from larceny and embezzlement: but, with these exceptions, their status of *non-legality* or illegality remained, with some advantages, it is true, but with many disadvantages.

In 1871 came the Act which is still the chief "charter" of trade unions.

The Legislation of 1871.

What was the object of the principal Act (1871)? Let us call contemporary evidence. "By the law, as it at present stood," said Mr. Secretary Bruce, in introducing the Bill (Hansard, February 14, 1871; 262) "these bodies [unions] could enter into no binding contract with any third person. Their secretary could not recover at law the salary which might be due to him for his services, nor could the union maintain an action against their

bankers for money deposited on their account, while, if they rented premises for the purposes of their society, in case of dispute with their landlord they were without any remedy at law. To remove these disabilities was one of the objects of the Bill." Again (*ibid.* 266), "the Bill did not propose to legalise what might be called primary contracts, such as agreements not to work or not to employ." The Earl of Morley, who introduced the Bill into the House of Lords, adopted this classification and these illustrations, adding that *secondary* contracts were to be enforceable (*ibid.*, May 1, 1871 ; 1918). Following the Home Secretary in debate, Mr. T. Hughes said, "The Bill had . . . many recommendations . . . It made, for instance, no attempt whatever to separate the funds of trade union societies into those subscribed for trade and those subscribed for other purposes. To make such an attempt would, he was convinced, be fatal to any measure, and would not be accepted by the unions. . . . It secured entire protection to the funds of trade unions" (*ibid.*, February 14, 1871 ; 270).

"The Act of 1871," said, in 1880, Sir George Jessel, Master of the Rolls, who had taken part in the debates on it, "was passed primarily with a view to preventing the treasurers and secretaries and officers of these societies from robbing them: that was the chief object. . . . Another object was this—there was a great difficulty in suing and getting their property from third persons, and one object of the Act was to enable these societies to sue in respect of their property, and also to enable them to hold property, such as a house or office" (*Rigby* v. *Connol*, 14 Ch. D. at 489).

Now let us turn to the Minority Report of the Royal Commissioners on Trade Unions, made by Messrs. Tom Hughes and Frederick Harrison in 1869, which, it is stated on authority,* at the time especially inspired Government

* *Per* L. Macnaghten in Taff Vale Case, p. 438.

legislation. At p. lix. they say, "A very serious question arises here as to whether legislation of a far more comprehensive character is not needed to place trade unions on a full legal footing; whether, in fact, a complete statute should not be enacted, analogous to the provisions of the Friendly Societies Acts and the Joint Stock Companies Acts and the like, by means of which uniform rules would be framed for the formation, management, or dissolution of these associations; and by which they should be enabled to sue and to be sued by their members, to recover from members their contributions or fines, and be made liable to members for the benefits assured. We are inclined to believe that the time has not yet come, if it ever come, for any such statute. The amount of feeling which this question arouses on both sides, the great irritation of those who have suffered by trade unions, and the extreme jealousy on the part of their members of State interference, would, we are convinced, render the attempt to pass such a measure impracticable. . . . Trade unions are essentially clubs, and not trading companies, and we think that the degree of regulation possible in the case of the latter is not possible in the case of the former. All questions of crime apart, the objects at which they aim, the rights which they claim, and the liabilities which they incur, are for the most part, it seems to us, such as courts of law should neither enforce, nor modify, nor annul. They should rest entirely on consent.

"The general effect of the present proposals would be this. All trade unions, the rules and bye-laws of which contained nothing criminal, and the expenditure of which was in accordance with law, would receive protection for their funds. They would not be able to enforce payments, or be liable to any regulations respecting the management of their affairs. Their rules and their expenditure would be open to inspection. . . . Any element of crime or mal-appropriation would deprive them of legal

protection. We do not consider that any system of compulsory registration would be either practicable or just" (*ibid.*, p. lx.).

Accordingly, they formally recommended (*inter alia*), "That it is expedient to give full and positive protection to the property and funds of trade unions.

"That it is expedient to carry out this end by the following process :—

"1. Certificate under the Friendly Societies Acts annually renewable, and giving the benefit of such parts of those Acts only as apply to certificated societies—that is to say, the power to appoint trustees, the summary process for arbitration, and the summary remedies against fraud and embezzlement. . . .

"5. Union not to be (otherwise than under the sections of the Acts referred to) capable of suing as a corporate body, or of recovering at law contributions, arrears, or fines against its own members, or of otherwise enforcing at law, or in equity any of its rules, resolutions, or contracts as against any of its members.

"6. Union not to be (otherwise than as aforesaid capable of being sued as a corporate body, or of being dissolved, or otherwise wound up by the courts ; and not to be accountable in law or equity to its members, in respect of any rule, agreement, resolution, or act of the society" (*ibid.*, p. lxiii.).

Finally, Mr. George Howell, sometime M.P., dealing expressly, in 1901, with the "Intention of the Legislature," says, "in this respect I can speak with some authority, as I had more to do with the negotiations respecting the enactment of the Trade Union Acts, 1871 and 1876, during their passage through both Houses of Parliament, than any other living man. . . . In my interviews with the then Home Secretary . . . the question of empowering trade unions to sue and be sued was often and often discussed. Some few were in favour of embodying such

power in the Trade Union Bill, but the vast preponderating opinion was averse to it. Any provision of that nature was intentionally left out; the Home Secretary being quite as strong on that point as Messrs. Hughes, Mundella, J. Hinde Palmer, Serjeant Simon, and, so far as my memory serves me, the late Lord Coleridge. The representatives of labour and officials of trade unions whose mouthpiece I then was, were strongly averse to any clause being in the Bill which would open the door to litigation. In this the Government concurred" (Preface to "Trade Union Law," Cohen and Howell, p. 40: to the same effect the same writer in "Labour Legislation," etc., p. 186; 1902).

Add to this that throughout the debates on the bill there is hardly a syllable as to litigation with unions by *outsiders*, i.e. persons unconnected with them (except, perhaps, a regret in one speech that the unions were not made outright suers and suable by the Bill, Hansard, 2040, March 14, 1871). Mr. T. Hughes, a lawyer, said, "It secured *entire* protection to the funds of trade unions" (*ibid.*, 270, February 14, 1871). In fact, every one believed that at that time, not being corporations, they could not sue or be sued.

Whatever the Act does or was intended to do, it certainly secures the other objects contemplated by its promoters, as mentioned in the foregoing citations. Let us turn to what it, in fact, says about suing and being sued.

The scheme of s. 9 is as follows: "The trustees of any trade union registered under this Act, or any other officer of such trade union who may be authorised so to do by the rules thereof, are hereby empowered to bring or defend . . . any action, suit, prosecution, or complaint . . . touching or concerning the property, right or claim to property of the trade union; and shall and may, in all cases concerning the real or personal property of such

trade union, sue and be sued, plead and be impleaded, in any court of law or equity. . . ."

(S. 8 had vested all the property of a union in its trustees, for whose appointment the rules must provide: schedule I.)

Now, it is obvious that if this section meant that the trustees could be sued *on any claim* against their union, the Taff Vale case was within it, and there was an end of the matter. But it was never suggested throughout the proceedings, either by the judge of first instance, or by the Court of Appeal, or by the House of Lords, that the case was covered by this section. On the contrary, Farwell, J., said, "Sects. 8 and 9 of the Act of 1871 expressly provide for actions in respect of property being brought by and against the trustees, *and this express intention impliedly excludes such trustees from being sued in tort*" (83 L. T. R. 475). (This would also be true of an unregistered union.) And the Court of Appeal said the section would be "a most remarkable section if, as is argued for the plaintiffs and held by the learned judge, the purview of the Act is that a trade union can be sued in its registered name. If this were so, what is the good of this section, expressly enabling the trustees or other officer of the union to sue or be sued in respect of property?"

It is clear, at any rate, that whatever s. 9 means, it does not mean that the trustees can sue or be sued generally for *everything*. What, then, does it mean?

There are two views.

1. The trustees can sue or be sued in respect of any contract whatever involving its property which the union may make, *e.g.* if the tradesman who furnishes their offices is not paid, he can sue the trustees, or, if he does not do his work properly, they can sue him.

2. The trustees have nothing to do with the contracts of the union which they themselves do not make. They have to account for the property which actually reaches

their hands (cf. s. 10), and in respect of such property, and of that only, they may be litigants like any other owner, *e.g.* if they hold a lease a covenant in which is broken, they may sue or be sued on it.

The second seems to us the better view, but against it must be noted that, if it is correct, a union could not, under this section, bring an action against a single trustee, or more acting in concert, to obtain possession of the funds. But Parliament may have intended that the union should take this risk as against a trustee. Moreover, there are almost invariably more than one trustee of a union, and there is nothing in this section to prevent one trustee from suing another. Further, s. 12 gives protection against a trustee.

It is, therefore, incorrect to suggest that s. 9 touches the liability of a union in tort.

Thus the liability of unions for torts is reached in quite another way than by s. 9, *viâ*, in fact, the Taff Vale case. Before dealing with that case, it must be mentioned that the Amendment Act of 1876 did not touch the point under examination, but that three reported cases do.

In 1892 a business firm brought an action for libel against a trade union and several of its officers, and obtained an interim injunction restraining further publication. The union did not appear at the trial (nor apparently before it). Mr. Justice Kekewich regretted that the case for them had not been argued, and made the injunction perpetual "against the Federation," adding, "whatever that may mean" (*Pink* v. *The Federation of Trades, etc., and others*, 67 L. T. 258).

In 1895 the same judge granted an interlocutory injunction for libel against a trade union and others, and the Court of Appeal refused to interfere. The union seems to have appeared to defend at these hearings, but it did not at the trial. The jury found against all the defendants, with £500 damages, and Mr. Justice Hawkins

gave judgment for that amount, and made the injunction perpetual (*Trollope and others* v. *The London Building Trades Federation and others*, 72 L. T. R. 342; 11 T. L. R. 228, 280; 12 T. L. R. 373).

Thus, throughout the whole of the proceedings in these two cases the point was never taken that a union was not suable.

On the other hand, in 1896 an interlocutory injunction was obtained against certain individuals in respect of illegal picketing. It would seem that the union to which they belonged had originally been added as defendants, and that a motion to strike out the name of the union was successful, for at the trial in 1898 Mr. Justice Byrne allowed the society the costs of that motion. Before the trial, too, the trustees of the union had been joined as defendants, and an injunction asked for against them to prevent their using funds in furtherance of certain libels (for which he awarded damages against other defendants) was refused, as he was "of opinion that there is no legal ground to justify such an injunction," and certain costs were disallowed to the plaintiffs in respect of it (*Lyons* v. *Wilkins*, 67 L. J. Ch. 383; 1889, 1 Ch. 255).

In no case, therefore, was the question of suing and being sued argued before the Taff Vale case.

The Taff Vale Case.

The facts in this case there is no need to set out here; they may be read in the *Times* (December 20, 1902; February 24, 1903) and in the Law Reports (1901, A. C. 426; 1901, 1 K. B. 170; 70 L. J. K. B. 219, 905; 83 L. T. R. 474; 85 L. T. R. 147; 17 T. L. R. 68, 698; 49 W. R. 101, 50 W. R. 44). The decision of the House of Lords is clearly stated in the headnote to one of these (L. T. R.), thus—

The effect of the Trade Union Acts, 1871 and 1876, is,

that a registered trade union may be sued in its registered name in respect of wrongful acts done by its agents with its authority.

Further, Lord Macnaghten lays it down that "a trade union, whether registered or *unregistered*, may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body." And this is, no doubt, the existing law.

Examining in detail the reasoning by which this conclusion is reached, we find Mr. Justice Farwell saying—

(i.) "Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual, a capacity for owning property and acting by agents, and such capacity involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. . . . The Legislature has legalised it, and it must be dealt with by the courts according to the intention of the Legislature."

(ii.) "The principle on which corporations have been held liable in respect of wrongs committed by its servants or agents in the course of their service and for the benefit of the employer—*qui sentit commodum sentire debet et onus* —is as applicable to the case of a trade union as to that of a corporation. . . . The proper rule of construction of statutes such as these is that, in the absence of express contrary intention, the Legislature intends that the creature of the statute shall have the same duties, and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing."

(iii.) The learned judge also thought that s. 15 and s. 16 of the 1871 Act, and s. 8 and s. 15 of the 1876 Act, all point to an intention to make a trade union, as such,

responsible; for all except s. 8 expressly impose penalties in certain events on trade unions *and* their officers: s. 8 speaks of a "liability actually incurred by" a union.

(iv.) Finally, he said, "The acts complained of are the acts of the association. They are acts done by their agents in the course of the management and direction of a strike. The undertaking such management and direction is one of the main objects of the society, and is perfectly lawful; but the society, in undertaking such management and direction, undertook also the responsibility for the manner in which the strike is carried out." As to "improper acts in the carrying out of the lawful purposes of the society, in such cases the principal, whether an individual or a corporation, or a body like turnpike trustees, is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. Granted that the principal has not authorised the particular act, but he has put the agent in his place to do that class of act, and he is answerable for the manner in which the agent has conducted himself in doing the business with which the principal has entrusted him."

All the noble and learned lords in the House of Lords expressly adopt Mr. Justice Farwell's judgment as a whole, except Lord Lindley, who does so in fact. Lord Halsbury expressly concurs with (i.) above; Lord Macnaghten expressly approves of (iii.).

Lord Macnaghten adds this argument: The Minority Report (above, p. 5) agreed that "except so far as combinations are thereby exempted from criminal prosecution, nothing should affect . . . the liability of every person to be sued at law or in equity, etc." (p. xxxi.), and goes on: "Now, if the liability of every person in this respect was to be preserved, it would seem to follow that it was intended by the strongest advocates of trade unionism that

persons should be liable for concerted as well as for individual action; and for this purpose it seems to me that it cannot matter in the least whether the persons acting in concert be combined together in a trade union or collected and united under any other form of association."

Lord Shand expressly adopted (iii.) and (iv.), thinking that "the power of suing and liability to be sued . . . is clearly and necessarily implied by the provisions of the statutes."

Lord Brampton amplified (iv.). From the very omission of any provision authorising the suing or being sued of a union (except s. 9), he inferred that the Legislature intended it to be known always and in all legal proceedings by its registered name.

This Lord Lindley repeats, accepting also (ii.), (iii.), and (iv.). In any case, he thought the officers, etc., of a trade union could be sued on behalf of the society; and that if the trustees were added as parties, an order could be made on them in the same action for damages and costs out of the society's funds.

The Commissioners' View.

Here we must mention the recent report of the Royal Commission. They apparently all defend the law, as decided by the Taff Vale case, on grounds not, so far as we know, previously advanced.

All the judges who took part in that decision seem to have thought that the liability of unions, if it arose at all, resulted from the status conferred on them by the Acts of 1871 and 1876. The Commissioners take a different view, and say (p. 3) they "are satisfied that the law laid down by the House of Lords involved no new principle, and was not inconsistent with the legislation of 1871." In their view the funds of trade unions were always liable for the torts of members, and the difficulties of reaching

those funds were difficulties of procedure only. "When," they say (p. 4), "an individual is cast in an action of tort, whatever property he possesses is liable to be attached for payment of damages. In the eyes of the law, a trade union before 1871 was nothing but an aggregate of individuals, and there never was a time when, if all the individual members had been brought before the court in an action for tort, and the tort had been proved against them or their agent, the property of the members, including the union funds, which belonged to them, would not have been liable to make good the damage. The union might be an unlawful association, but this would be immaterial. . . . This liability of the funds of a trade union in an action of tort could at any time have been effectively realised in case of a trade union consisting of a very small number of persons."

They then proceed thus: "If the liability was not enforced, it was not because trade unions were regarded as peculiar institutions outside the law, but owing to difficulties in procedure," which they go on to point out.

With deep respect for the opinions of the Commissioners, we are unable to assent to this view. No doubt the difficulties of procedure referred to were of themselves sufficient to prevent any practical attempt to reach the funds in an action of tort, and no such attempt, it is admitted, is known, but we think the immunity from such actions before 1871 rested on a firmer base than considerations of procedure.

Of course, when an individual is cast in an action of tort, speaking generally, any property he possesses is liable to be taken to satisfy the damages awarded, and in the eyes of the law a trade union before 1871 was nothing but an aggregate of individuals. Even assuming that the funds contributed by members to their union for specified purposes, some legal, some illegal, could be deemed in law still to belong to them, which we greatly doubt, there

seems to us to be a great difference between attaching (if this was possible) the property of a tort-feasor to answer his own debt and taking the property of a number of persons whose only association was a tie not recognised by law, and some of whom *ex hypothesi* might neither be tort-feasors at all, nor have authorised the commission of any tort. Could not such an action have been defeated by a single member showing that he had expressly forbidden and repudiated the commission of any such tort, and, perhaps, had published his disavowal? And would there have been the smallest difficulty in bringing forward such a member?

To take the case, put by the Commissioners, of a union consisting of a number of persons so small that they could all be made defendants in tort, the statement that in this way the funds of a union could be reached seems to us equally incorrect. If each member was guilty of tort, whether in combination with others or not, each is individually liable to an action. Judgment would be recovered against each separately, and assuming even that each has a vested claim to an ascertainable share of the common funds, and that such funds could be attached, each would find his own particular proportion taken in respect of the damages against *him*. This seems to us no more a taking of the union's funds than if money belonging to each defendant and capable of attachment was taken in the hands of any other third party.

There remains the question whether the union funds could be made liable for the torts of a few of its members on the ground that they were the authorised agents of the whole body. This already assumes something capable in law of conferring authority. But no such thing existed. In the words of the Commissioners, a trade union before 1871 "was nothing but an aggregate of individuals." Should the more responsible members of a union authorise other members to commit torts, they, of course, became

tort-feasors equally with the actual perpetrators of misdeeds, as being accessories before the fact or joint conspirators. In either case each made himself personally liable, and property belonging to each, wherever found, was no doubt in theory available to satisfy damages awarded.

Now, in the absence of express authority, the law could not infer from the terms of association alone an implied authority or agency, which presupposes some legal entity to confer it. This would have been to recognise the union as something distinct from its members, which it was notorious in 1871 that the law did not do.

We venture to think that if this theory—which, after all, is but a speculation of the Commissioners—is correct, it is remarkable that generations of lawyers never hinted at it.

Agency.

The question of agency, however, thus incidentally raised, leads to a very important suggestion that has been made. It has been proposed, to meet the views of unionists with regard to protection of union funds, to deal with the existing law of agency without granting total immunity. Unionists complain, sometimes with reason, that juries are always ready to imply agency for wrongful acts on behalf of the union in persons who, in fact, are not responsible officials, and have had no authority conferred upon them to do what they have done—for over-zealous members who, in time of disturbance, take upon themselves a control which their position in the society does not justify. It seems reasonable that the funds of the whole body should be protected against the spontaneous acts of such persons. But the acts of the genuine agents of the union ought, we think, to bind the union as at present. The men who actually control the policy, the funds, and the operations of the union must be deemed the agents of the union. If the law of agency in this connection could be satisfactorily

defined, unionists would probably not object to its application to their societies, as to others. Accordingly we suggest that unions should not be held liable for the acts or defaults of any persons, unless those persons have been regularly appointed by them to definite positions of control, *i.e.* their officials; provided that the names and addresses and offices of such persons have been duly registered. Thus the ordinary avowed agents of the unions would be their president, treasurer, secretary, and members of the executive committee; possibly also delegates and shop stewards. The details must necessarily in each case be left to the particular union, as organizations vary; the essential provision is that the registered agents should be, in fact, the controlling powers of the body.

Once this policy is honestly carried out, the union would be absolutely free from the unauthorised acts of irresponsible persons, which they now consider a grievance; while, *per contra*, no doubt could arise as to their liability for the acts of this limited group of officials. Once appointed, all delegated authority must be derived expressly from these official persons. The union, as such, should have no further right to delegate authority to any one else over their heads; whatever is to be done is to be done through them. Of course, the general body of members would retain their normal right (under their rules) to change their officials.

Branch Agents.

The subject of agency has also been raised by the sixth recommendation of the Commissioners (Sir G. Lushington and Sir W. Lewis dissenting), which is—

To legislate "to provide means whereby the central authorities of a union may protect themselves against the unauthorised and immediately disavowed acts of branch agents."

This raises the difficult question of the relation between a union and its branches. Is the branch independent of the union? This must largely depend in each case on the governing rules and regulations—"the articles of association," as they have been called. Naturally in a local dispute the branch has, and must have, general control of operations, and must, therefore, possess a certain amount of autonomy. If in a given case, the branch has, in fact, acted independently of the union, something is to be said for this recommendation. But even then it is to be noted that, so far as it legalises *disavowing* certain acts of agents *after the events*, it is unique in the relief it affords to a union, and totally opposed to the fundamental principle of the law of agency. Our own suggestion above avoids that extreme.

Broadly, one of the best tests of independence is to whom does the money collected by the branch belong? Generally it is to the union as a whole, subject to its duty to provide for the current expenses of the branch. This differentiates this relation from that of a university to its colleges, to which a comparison has been made. The branches as "lodges" are certainly for many purposes independent unions, but as they usually have small funds or none, their liability is not of so much practical importance as that of the union. Thus in the recent case (*Airey* v. *Weighill*, reported in the *Times* of February 11, 1905), a foreman—who had been dismissed with proper notice—brought a conspiracy action against the trustees of the union, the officials (president and secretary) and members of the local lodge; the secretary was sued both in a representative and personal capacity. Only the trustees and the local secretary defended, and the Court of Appeal, reversing the verdict as to them, released them from the payment of damages, holding that neither the union nor the branch was liable. There was "no trace of assent on the part of the union to what was done;" and

as to the lodge, the cardinal fact the Court apparently relied on was that it had no power under the rules to grant strike pay, and therefore its "approval" of the threat to strike—which the jury found—was not enough (for it could not secure the disaffected the pay without which they could not strike). To make the branch liable there must have been a resolution actually authorising the strike.

If the law on the relation of unions to branches may be generalised from this case, it seems satisfactory. Nevertheless, we think that any substantive change of the law should only be made as part of a general revision (if any) of the law of agency, as affecting trade unions. Only so could the subject of branches be effectively treated.

Ultra Vires.

This case also leads to another suggestion that has been made, viz. that the union should not be liable for any acts of its agents, whether formally appointed or not, which could be proved to be *ultra vires* of the rules ; *i.e.* if the agents do anything involving legal liability which they had no authority conferred upon them under the registered rules of the union to do, the union should not be liable.

This is to approximate the rules of a union to the memorandum of association of a limited liability company, and to treat acts entirely outside the true intent of the rules as being to the same extent *ultra vires* as would be the acts of directors outside their memorandum. For acts clearly within that document, even though amounting to a tort, the company is often liable ; while for acts widely without it the company may be free, while the directors are personally "hit." But, to say nothing of the fact that unionists have always repudiated the analogy between their societies and limited companies, we do not think that this suggestion would be of much practical use. For this reason, chiefly. The rules of every union must necessarily

provide for the conduct and control of strikes and industrial disputes generally. Therefore it is almost impossible to conceive of any acts, even torts, done in the ordinary operations in pursuance of this general authority which could be regarded as *ultra vires* the charter of the association. Nor, we may add, do we know of any case in the past in which the suggested safeguard would have protected the union.

Alteration of the Law.

The state of the law being what the House of Lords has decreed, it is proposed to alter it on the ground that—

(A) The legislature never intended to make unions suable or capable of being sued.

(B) It is unjust that they should be so.

With (A) we have dealt above (pp. 4–11). It must be added that the three Lords Justices in the Court of Appeal took this view: It was not "by error," they said, that Parliament had omitted to make a union a corporation; s. 9, by carefully defining who may sue and be sued, is a proof that no general power was contemplated. Both "by reason of the language of the Acts and what is omitted therefrom" they find "the exact contrary." And they insisted that as a corporation or an individual were the only entities known to the law, and that as a union was neither, it could not without an enactment sue or be sued: "it is incorrect to say that such an entity can be sued unless there be found an express enactment to the contrary."

(B) Whether the present state of the law is just or unjust is not a question of law. But it may be briefly pointed out that the usual argument is that the injustice arises from the very essentials of a union's existence; their members are necessarily very numerous, and the unions can only exercise control over a very few—practically, their officials; but yet, during a strike, they

are in danger of being held liable for the unauthorised acts of any member, though, in fact, they have given him no authority at all; that the law of agency is invariably invoked against them, and they are at the mercy of a jury —generally, a special jury, an unsympathetic body—on the findings of the facts. Conformably to this view the Trade Disputes Bill of 1905 (reintroduced this year by Mr. Hudson) proposed to enact (s. 3)—

Protection of trade union funds.

"An action shall not be brought against a trade union or other association aforesaid for the recovery of damage sustained by any person or persons by reason of the action of a member or members of such trade union or other association aforesaid."

This became in the Standing Committee on Law—

"An action shall not be brought . . . by reason of any act or conduct of a member or members of such trade union or other association aforesaid, unless the member doing the acts complained of can lawfully be held to be an agent of the trade union, or unless such acts have been adopted or ratified by such union."

This latter clause expressly preserving the law of agency is far from securing total immunity of trade union funds.

In the Bill of 1906 (backed by Sir Charles Dilke and Mr. Keir Hardie) this appears thus:—

Prohibition of actions against trade unions.

3. "An action shall not be brought against a trade union, or against any person or persons representing the members of a trade union in his or their representative capacity."

This very far-reaching provision would take away even the action against trustees given by s. 9 (above p. 8).

Total Immunity.

Taken literally, both these proposals mean that total immunity is to be secured to trade union funds not only during and in respect of a trade dispute, but at all times. Possibly, however, "aforesaid" in the 1905 Bill is an

unskilful reference to s. 1, and we must read in, "in contemplation of, or during the continuance of, any trade dispute." Moreover, this section releases trade unions as such from the ordinary law of agency, both as to contracts and as to torts, where the agent of the union is a member of it, as almost invariably is the case. The liability of the union for the act of its agents who are not members of it is left by this proposed section as it is.

Thus, to take an extreme case, if a number of members on strike, either on the formal advice of union officials, or a resolution of the union, do any damage to property—for example, burn down a mill—the union is not to be liable to the owner. The actual offenders—it is, no doubt, intended—would be left in such cases to the criminal law.

But, it must be noted further, that the section in the 1905 Bill does not relieve the actual individual wrong-doers—the officials and members in the case supposed—from their individual civil liability for damages. This is sometimes overlooked, and this kind of remedy is sometimes underrated. For such individuals are frequently by no means "men of straw," and, if they are cast in damages, they run the risk of losing all their savings and other worldly possessions with the possible alternative of bankruptcy, entailing many serious disqualifications, as, for instance, in the case of a member of Parliament, that of forfeiting his seat.

Whether this limited amount of civil liability, in lieu of the present liability of the union funds in such a case, will afford sufficient protection to the injured property-owner is a grave problem.

It only remains to point out that it might be suggested that it should be enacted simply that a trade union shall not be deemed to be a corporation or a legal person for any purpose whatever. This, of course, implies total immunity of its funds for all purposes whatever; but this is going beyond the effect of the section.

Suggestions falling short of Total Immunity of Funds.

Some suggestions have been made with a view to meet, in the interest of the unions, the effect of the *Taff Vale* and other decisions, and these alternatives cannot be conveniently dealt with until some of those other decisions have been shortly considered.

Other Decisions: *Quinn* v. *Leathem*, *Allen* v. *Flood*, *etc.*

I. Motive.

Besides the *Taff Vale* case, unionists complain that other recent decisions have rendered their position uncertain and unsatisfactory.

It is commonly said that the decision of the House of Lords in *Allen* v. *Flood*—hailed with such enthusiasm by trade unions—and that in the *Mogul Case*, have been whittled away by subsequent judgments of the same tribunal, especially in *Quinn* v. *Leathem*.

Allen v. *Flood* decided that: "An act which does not in itself amount to a legal injury cannot be actionable merely because it is done with a bad motive" (69 *Law Quarterly Review*, 1, by *A. V. D.*). This was not a declaration of the law for the first time. Baron Parke had laid down the same rule half a century before (*Stevenson* v. *Newnham*, 13 C. B. 285).

The question what acts trade unions may do with the object of protecting and extending their trade, and increasing their remuneration, was clearly raised in the *Mogul Case*—technically and in substance a trade union case—decided in the House of Lords in 1891. According to the report (1892, A. C. 25): "Owners of ships, in order to secure a carrying trade exclusively for themselves, and at profitable rates, formed an association, and agreed that the

number of ships to be sent by members of the association to the loading port, the division of cargoes, and the freights to be demanded, should be the subject of regulation; that a rebate of 5 per cent. on the freights should be allowed to all shippers who shipped only with members; and that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners; any member to be at liberty to withdraw on giving certain notices.

The plaintiffs, who were shipowners excluded from the association, sent ships to the loading port to endeavour to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid the plaintiffs, and reduced freights so low that the plaintiffs were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and circulated a notice that the rebate of 5 per cent. would not be allowed to any person who shipped cargoes on the plaintiffs' vessels. The plaintiffs having brought an action for damages against the associated owners, alleging a conspiracy to injure the plaintiffs—

Held [unanimously], ". . . that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the plaintiffs had no cause of action."

What, then, are the principles laid down in these two cases, considered together?

They seem to be—

(*a*) That in a commercial or industrial dispute, where each party is striving to secure for himself or his side an advantage at the expense of the other, the association together, or the acts done in furtherance of the object aimed at, must (to be actionable) in themselves be a legal wrong or violation of the legal rights of the other party, and that the intent, whether good or bad, can make no difference;

(*b*) That, it is not unlawful for persons to combine to so manage and arrange their own business as to interfere even seriously with the freedom of will and trade of another person, if the interference is the result of acts done for the purpose of extending or protecting their own trade.

On such decisions workmen's unions naturally reasoned that competition in labour must stand on the same footing as competition in trade. The *Mogul Case*, they thought, shows that in a commercial dispute "boycotting" your adversary for the purpose of protecting or improving your own trade position is not an unlawful act, and since *Allen* v. *Flood* it is immaterial that a jury may find this was done "maliciously" to injure the adversary or that it has in fact injured him.

In 1901, however, the House of Lords decided *Quinn* v. *Leathem* (1901, A. C. 495 ; 85 L. T. R. 289). The head-note of the latter gives the facts succinctly as follows:— "The respondent (L.) was a butcher carrying on business at Lisburn, . . . and the appellant (Q.) was the treasurer of a registered trade union. . . . In 1895 a dispute arose between the respondent and the society on the question of the employment by the respondent of men who were not members of the society. The respondent refused to discharge his non-union men at the bidding of the society and the society consequently brought pressure to bear upon customers of the respondent, and in particular upon . . . Munce, . . . who had had large dealings with the respondent for a long time, to induce them to cease to deal with him—in several cases, including Munce's, with success. They also induced some of the respondent's servants to leave him. It was proved that the appellant (Q.) had taken an active part in the proceedings against the respondent. The respondent brought this action against the appellant and other members and officers of the society to recover damages for the loss sustained by him in consequence of their conduct." He was awarded

£250. The House of Lords unanimously upheld this verdict, some of the noble and learned judges having been in the majority who decided *Allen* v. *Flood*.

What did this case really decide? The verdict, or a part of it, might have been supported on the ground that the facts showed the procurement of a breach of (one) existing contract; but this was throughout treated as a comparatively insignificant matter, and was scarcely relied upon as justifying the decision, which was much wider. It may be stated, in the terms of the headnote to the other report cited above—

"A combination of two or more, without justification or excuse, to injure a man in his trade, by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to him, actionable."

Now, in considering this case, it must never be forgotten that the inference drawn from the facts by many of the judges was that the predominant motive of the defendants was *not* primarily to advance the interests of their trade organization, for Leathem and the men who remained with him were willing to "come into line" with the requirements of the union, but was to punish him and them for having for a time held out against them.

Lord Shand put it thus: "As to the vital distinction between *Allen* v. *Flood* and the present case, it may be stated in a single sentence. In *Allen* v. *Flood* the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors; whereas, in the present case, while it is clear there was combination, the purpose of the defendants was 'to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests.'"

If the decision in this case only means that, admitting a trade dispute to be a form of warfare, then there are laws

of war which must be observed, and there is no legal justification for combining to injure an enemy who has in fact surrendered in order to punish him for not having surrendered before, the case, we think, has not the importance which is often attributed to it, and does not conflict with the *Mogul Case* or with *Allen* v. *Flood*.

But if, on the contrary, *Quinn* v. *Leathem* decided that, assuming the same acts committed with the primary intention of advancing the trade union interests were legal, but became illegal because done in association and prompted by a bad spirit, we think it is inconsistent with the effect of the combined judgments in the two former cases. As one of us has said elsewhere, "But—and here comes out the essence of the difference between the two cases (*Quinn* v. *Leathem* and *Allen* v. *Flood*)—the interests of their union were furthered to such a trifling extent in proportion to the damage inflicted on Leathem, and that, perhaps, on Munce, and that proposed to be inflicted on Leathem's non-union men, that it was universally believed by almost (if not quite) every judge who heard the case—and there were no less than fifteen—and apparently by the jury, that their main object, practically their sole object, was to wreak vengeance on Leathem's men for not joining their union as they thought they ought to do, on Leathem for not assisting them to punish his non-union men by discharging them, and on Munce for not assisting them to punish Leathem" (Recent Trade Union Cases, 2nd edit. p. 9, 1903).

In the Report of the Royal Commission on Trade Disputes, etc. (1906), a note is appended (p. 19) by the chairman, and accepted by Mr. Arthur Cohen, K.C., to the effect that in their opinion the law as laid down in *Quinn* v. *Leathem* is not inconsistent with the judgments in the *Mogul Case*. After much consideration, we can, with great deference, only agree with this opinion if the former decision was based on the fact that the impugned acts were

not in pursuance of a trade dispute, but after a trade dispute had terminated.

This raises the question of—

Predominant Motive.

Despite the prevalent view of the decision in *Allen* v. *Flood* (p. 24), juries are constantly invited to consider what was the predominant motive with which the acts complained of in a trade dispute were done.

Indeed, in his opinion on that case itself, Wills, J., said, "The notion that the same thing may be unlawful or may be lawful, may or may not constitute a cause of action, according as it is or is not done out of spite or ill-will, or from some improper motive, is very well known to our law" (67 L. J. Q. B. 144).

So Mr. Justice Walton, in *Giblan's Case* (p. 40), said, "Having regard to the decision in the House of Lords in the *Mogul Case*, I do not think that this" (*i.e.* unionists conspiring with their officials not to work for a master who employed the plaintiff, and so depriving him of his "job") "would be an actionable wrong if it were done for the purpose of protecting or advancing the interests of the members of the union, as, for instance, for the purpose of securing more work or better wages for themselves, even though a necessary consequence of such action would be to injure the plaintiff. On the other hand, having regard to the decision of the House of Lords in *Quinn* v. *Leathem*, I think that it would be an actionable wrong if it was done, not to advance the interests of the union, except, perhaps, in some remote and indirect way, but, directly and primarily, for the purpose of injuring the plaintiff" (18 T. L. R., at p. 501).

Lord Justice Romer thought that "the intent on the part of" two individual defendants was to injure the plaintiff (19 T. L. R., at p. 710).

Again, in *Thomas* v. *Amalgamated Society of Carpenters and Joiners*, if a newspaper report may be trusted (*Times*, April 28, 1902), where a workman lost employment through the defendant union calling out their men in shops where he was at work, Mr. Justice Wills said, "The real question for the jury was whether the action of the delegates was taken to promote the legitimate interests of the society or vindictively to punish the plaintiff." Thomas got a hundred pounds damages, and a perpetual injunction against the union interfering with him.

Again, in *Read's* case, the present Master of the Rolls said, "Nor do I think that in civil actions any more than in criminal it will be possible to eliminate motives from the discussion" (1902, 2 K. B., at 539). And, in fact, juries never do eliminate that factor in deciding on the legal or illegal nature of trade disputes. In the words of L.J. Bowen, "The good sense of the tribunal which had to decide would have to analyse the circumstances, and to discover on which side of the line each case fell" (*Mogul Case*, 23 Q. B. D. 678 in 1889). But sometimes it is impossible to distinguish on which side of the line the case falls. The truth is that, in industrial warfare, the attempt to gauge accurately the strength of the respective desires to further your own interest and to damage your opponent is generally impracticable and fallacious. Both desires may be present in greatly varying degrees, but both invariably are present.

In 1891 Lord Coleridge remarked: "Where the object is to benefit one's self, it can seldom, perhaps it can never, be effected without some consequent loss or injury to some one else. In trade, in commerce, even in a profession, what is one man's gain is another's loss; and where the object is not malicious, the mere fact that the effect is injurious does not make the agreement either illegal or actionable, and therefore it is not indictable" (*Curran* v. *Treleavan*, 1898, 2 Q. B. 563).

The legal importance of "motive" arises only from its being evidence of a conspiracy to injure, and it is in cases of that sort only—at any rate, since *Allen* v. *Flood*—that the question where to draw the "line" has been considered. Such discussion would be in the future for the most part unnecessary if our suggested alteration in the present law of conspiracy be adopted (see p. 39). Apart from conspiracy, the recommendation of the commissioners (except Sir W. Lewis), if adopted, would meet the case, viz. to legislate that an individual shall not be liable for doing any act not in itself an actionable tort, only on the ground that it is an interference with another person's trade, business, or employment—*i.e.* "boycotting" in any shape would not be illegal, but defamation would, as at present. It must be noted that this suggestion is not confined to trade disputes. As will be seen (p. 35), s. 1 in Sir C. Dilke's Bill provides to the same effect in trade disputes only, but in a more objectionable form.

II. Interference with Contracts.

(*a*) *Existing Contracts.*
(*b*) *Contemplated Contracts.*

(*a*) It must now be regarded as settled law that to procure the breach of a contractual relation is generally a tort, entitling the person injured by the breach to maintain an action against the person whose conduct brought it about.

The well-known case of *Lumley* v. *Gye* (2 E. and B. 216) in 1853 has been followed by the House of Lords in the *Glamorgan Coal Co.* v. *The South Wales Miners' Federation* (1905, A. C. 239), known as the "*Stop-Day*" case. It is true that the proposition just set forth is followed by some such qualifying words as "without legal excuse," or "unless there be justification for interference,"

and so forth ; but the *Glamorgan* case shows that a *bona fide* belief on the part of the officials of a trade union that the exact performance of the terms of a contract would be prejudicial to the best interests of both parties is no justification for procuring the breach thereof. For in this case it was found that the trade union and its officials acted honestly, without malice or ill-will toward the employers, and with the sole object of keeping up the price of coal, by which wages were regulated, yet this was held to be no legal justification for interference with the contract between employers and employed.

Now, whatever opinions may be held on the morality or the law as to inducing persons to break contracts, no one has ever suggested, throughout the whole of what may be called the trade union controversy, that the actual breaker of a contract should not be liable for his breach ; no hint of anything to the contrary has been heard. It must be remembered, then, that the sanctity of actual contract is not in question. And it is amply protected by law. But different considerations come into play as to the immorality or illegality of *inducing* or procuring a party to a contract to break it. In the first place, it is one of the commonplace facts of life that every human being at some time or other demands or requires guidance and counsel. Men and women, even of mature age, vary much in the qualities of character, and notably in judgment, discernment, knowledge, and foresight. Hence nature and society have provided many classes of advisers and guardians. The propriety or expediency of breaking a contract is but a special case of the infinite occasions on which one person may consult another or be warned by another. Instances at the two extremes are readily conceivable. It is sometimes a positive duty for a father to bring the greatest possible pressure he can command upon a daughter to renounce an undesirable marriage engagement into which she has solemnly entered, or for a doctor

peremptorily to forbid a patient to continue a contract as he values his health or life—in both cases, to the serious detriment, it may be, of the other party to the contract. Or again, a solicitor may advise a client that it will pay him better to throw up a contract. At the other end of the line is the greedy adventurer who, to fill his own pockets, seduces by a bribe a valuable servant from his employer, or procures the divulging of a secret which others had covenanted between themselves to keep. Between these extreme cases there are intermediate innumerable others in which the morality or the law is more doubtful, and among these will be found the normal case in which trade union operations include an inducement to break contracts.

No one will deny that the ordinary trade unionist workman is a person who is likely to be often in need of advice in trade matters affecting, generally, his fellows as well as himself, but sometimes himself alone: he may often be in doubt both as to law and as to policy, and that he should pay a weekly or monthly subscription to secure, among other benefits, the opinion of those with more experience than he has, or to get the advantage of the common funds to ensure legal aid, is not surprising. That there must be a correlative duty to afford the assistance required in each instance, or to proffer it where there is a general duty to watch over and to protect the interests of a given trade group, especially where that is the very *raison d'être* of the institution, must be obvious. In the memorable *Stop-Day* case it was never doubted that the wholesale breaches of contract had been genuinely prompted by a desire to put more money into the pockets of both employers and employed, and the *bona fides* of the counselling union was not impugned. Assuming the perfect honesty of all concerned, it is difficult to see why the father and the doctor, or the solicitor, in the illustrations above made—which, by the way, were pressed on the court in this case—should go

scot free while the union in this case was heavily mulcted. It is, indeed, true that the "jilting" daughter and the manager who suddenly throws up his appointment are liable in damages at the suit of the respective persons disappointed, and so were the Welsh miners under the Employers and Workmen Act, 1875. If it be urged in the latter case that the offenders were probably "men of straw," it must be remembered that their employers knew this perfectly well when they took them "on," and there is no reason why an employer of labour who contracts with poor men who are members of a union should be in a better legal position than one who employs those who are not, or, generally, than the mass of people who contract with persons who could not pay substantial damages. If it be said that in this and other cases it was the union that instigated the men to break their contracts (though, in the *Glamorgan* case this is probably not the fact), and so deserves to be "hit," we hope that we have later (p. 40) given some reasons why, in law, no distinction should be made between a union and its members.

And, generally, the liability of individuals who counsel the breaking of contracts tends to weaken the sense of responsibility of the actual contractor, which, as we have pointed out, ought to remain absolutely unimpaired.

The Majority Report of the Royal Commission, however, recommends that the law should declare that "to persuade to strike, *i.e.* to desist from working, *apart from procuring breach of contract*, is not illegal."

It is obvious that if total immunity of trade union funds is enacted, it is a matter of indifference to unions whether inducing to break a contract remains illegal or not. Moreover, with or without total immunity, the law of agency could be so altered as practically to exempt union funds from this liability.

(It may be added that, historically, this legal principle originally applied only to contracts between masters and

servants, and that so late as *Lumley* v. *Gye*, Coleridge, J., argued in a most able judgment that it was still confined to them. If that argument was correct, this form of liability may be traced directly to the kind of legislation of which the Statutes of Labourers (1349, 1351) are the best known examples, by which labourers were regarded as serfs and chattels.)

It may be also argued that, as the law on this point is now settled to be general, there is no reason for altering it specially in favour of unions. Contracts of labour are generally for a short term, and tend to be for shorter.

The Bill of this session (1906), brought in by Sir Charles Dilke and Mr. Keir Hardie, provides, s. 1—

"Where an act is done in contemplation or furtherance of a trade dispute, the person doing the act shall not be liable to an action on the ground that by that act he interfered, or intended to interfere, either with the exercise by another person of his right to carry on his business, or with the establishment or continuance of contractual relations between other persons: Provided that nothing in this section shall exempt such person from liability on any other ground." We cannot think that this is skilfully drawn. We make suggestions on these points (pp. 63, 64).

(*b*) *Contemplated Contracts.*

Here the legal position is quite different, just as in practice it is a very different matter to induce a man to break a contract in existence from inducing him not to enter into one. The point usually arises in a trade dispute when, a strike having been declared or contemplated, members of unions, frequently pickets, endeavour (1) to induce men still at work or determined to remain at work not to "take on" another job at the expiry of the present one; (2) to induce men brought to the spot in contemplation of entering into a contract forthwith not to

enter into such contract; (3) to induce others besides servants, *e.g.* customers or persons usually doing business with the employer, not to deal with him; (4) to induce the workpeople of such customers and traders not to enter into fresh contracts after the expiry of the present contract with their respective employers.

It may be said at once that the only inducing here considered is that which is lawful: it is conveniently spoken of as "peaceable persuasion." We prefer the expression "by means not criminal." Any other form is sternly repressed by law: see on this, p. 49.

As to these four categories of persuasion, there seems to be no difference of *principle* between them. If it be moral and legal to induce any one to espouse your cause, it cannot be the reverse because the person induced has no individual interest in the quarrel. And the law has always (despite a few aberrations in individual judgments) recognised a very broad distinction between inducing to break actual existing contracts and inducing to prevent contracts coming into existence. To quote only the classic passage in Lord Herschell's judgment in *Allen* v. *Flood* (1898, A. C. pp. 120–1): "In *Temperton* v. *Russell* the further step was taken by the majority of the Court . . . of asserting that it was immaterial that the act induced was not the breach of a contract, but only the not entering into a contract, provided that the motive of desiring to injure the plaintiff, or to benefit the defendant at the expense of the plaintiff, was present. It seems to have been regarded as only a small step from the one decision to the other, and it was said that there seemed to be no good reason why, if an action lay for maliciously inducing a breach of contract, it should not equally lie for maliciously inducing a person not to enter into a contract. So far from thinking it a small step from the one decision to the other, I think there is a chasm between them. The reason for a distinction between the two cases appears to

me to be this: that in the one case the act procured was the violation of a legal right, for which the person doing the act which injured the plaintiff could be sued as well as the person who procured it, whilst in the other case no legal right was violated by the person who did the act from which the plaintiff suffered: he would not be liable to be sued in respect of the act done, whilst the person who induced him to do the act would be liable to an action"—a *reductio ad absurdum*.

This is undoubtedly the law, and we are not aware of any case in which any individual alone has been cast in damages for inducing some one not to enter into a contract. There are many where verdicts have been obtained against conspirators who have combined to do this, and such inducements have been taken to be evidence of the existence and the spirit of such conspiracy, but this is an incident of the law of conspiracy and not of the ordinary law of contract. As to the law of conspiracy, see p. 39, and as to the special interference of pickets, see p. 49.

Believing the law to be as stated by Lord Herschell, it seems superfluous to argue in favour of it. But it may be mentioned that the logical justification for such law is the general right, so freely used in political canvass, of one citizen to endeavour to convince another of the justice of some propaganda he has at heart. We need not add that this liberty is one of the chief factors in our national history.

Our view is in part advocated in recommendation of the Report (p. 34), for "to persuade to strike" is at least inducing workmen not to renew existing contracts with masters.

If the general principles we have here touched upon are sound, there can be no reason for legislating differently for each of the four categories (pp. 35, 36), though, at first sight, the legal position of a person trading with the employer aimed at is very different from that of a party to the actual quarrel. But so long as peaceful persuasion

is recognised as the *right* of every citizen, the individual on whom pressure is brought to bear must be left to his own estimate of his interests, to his own strength of will, and to his own sense of justice, to resist any proposals of which he does not approve. And it may be pointed out that it is certainly more to his advantage to receive authoritative notification of a contemplated strike—*i.e.* a "sympathetic or secondary" strike, a term invented by the Commissioners—than to learn it for the first time, as he certainly would, from the simultaneous resignations of all his disaffected workmen. It is not necessary to point out that the value of these secondary movements to unionists is to stop supplies to the principal adversary. We have seen that the Commissioners (Sir W. Lewis dissenting) recommend the express legalisation of persuasion to strike. Their previous recommendation is by an Act to "declare strikes from whatever motive or for whatever purposes (including sympathetic or secondary strikes) apart from crime or breach of contract, legal, and to make the Act of 1875 to extend to sympathetic or secondary strikes." This we understand to mean that secondary strikes are to be legalised, but to be subject to the same restrictions under the Act of 1875, as other strikes, *e.g.* the limitations as to picketing would apply.

It ought to be made clear, especially in respect of class 2, that *legal* persuasion, if any is illegal, includes offers of money, hospitality, etc., to the person persuaded. Not only would such help generally be the barest justice to a workman away from home, and, *ex hypothesi*, throwing up a job, who would otherwise probably be destitute, but if it is once admitted that the struggle for the adhesion of the imported workpeople is to be left to be fought out between the unions and the masters, *i.e.* often between master's unions and men's unions, then there seems to be no reason why the power of the purse should be assisted by that of the law on one side or the other; the workman must

judge to which side it is more worth his while to belong, and must be effectually supported by the law whatever his resolve may be.

Suggested Amendment.

At the same time, there would be much less scope for alleged misunderstanding, if every employer who, in view of a strike, imported new workmen into his "shop," was bound by law to disclose to each of them that in fact a strike prevailed or was about to prevail there, under penalty, on failure to do so, of being disabled from taking any proceedings against any such workman for breaking his contract (within two days of the beginning of the service), and of having to pay him damages for loss of time, fare, etc. This is but the correlative of what is proposed below (p. 58) by way of restrictions on pickets. Some such rule would enable the workman, if he chose, to ascertain the merits of the dispute before he accepted employment, and would prevent his alleging later that, had he known the facts, he would never have come (see the cases on picketing, p. 50). However, with the present facilities for communication through the press and the telegraph, it is increasingly difficult for workmen to remain ignorant of industrial disturbances: this, however, applies with much less force to foreign countries.

III. Conspiracy to Injure.

In the *Taff Vale Case*, and in practically all cases where a union has been mulcted in damages, it has always been "hit" in an action for conspiracy to injure, both the conspiracy and the injury being found as facts. Accordingly, the Trade Disputes Bill proposes to enact as an "Amendment of Law of Conspiracy" as follows (s. 2):—

"An agreement or combination by two or more persons to do or procure to be done any act in contemplation and

furtherance of a trade dispute shall not be ground for an action, if such act when committed by one person would not be ground for an action."

(This reappears almost verbatim as s. 2 in Sir Charles Dilke's and Mr. Keir-Hardie's Bill, 1906.)

It will at once be noticed that this section keeps alive the action for conspiracy when there is a conspiracy to do something which would be wrongful on the part of one person. Applying this to a trade dispute—to take again as an illustration the extreme case already supposed—a union official who successfully urged on any member to destroy or injure property would still be liable *civilly* for conspiracy, and so would any combination of members *inter se* for any such acts. Assuming that total immunity of union funds was the law, it would not affect the union whether it was "a person" within this section or not, but, apparently, this section is not intended to include unions at all.

But—whether total immunity be conceded or not—even a wider suggestion than this may be made, viz. the total abolition of the action for conspiracy to injure in trade disputes. This would at once get rid of conspiracies (1) between a union and individual members of it, (2) between individual members of a union, (3) between individual members of a union and individual non-members, (4) between unions and other unions, and (5) between unions and individual non-members.

(1) It would, undoubtedly, be a real relief to unions to be made invulnerable to actions for conspiracy, and in the case where it is alleged that they have conspired with their own members, they are certainly confronted with a legal fiction. For the law assumes that the union and its members, or some of them, are different entities, whereas in fact, they are not for many purposes. For instance, in *Giblan's Case* (1896–7)—where a workman who had lost employment through union officials giving notice to

members that if they worked with him they would be called out, brought an action for conspiracy against the union and the two officials and recovered £100 damages —Lord Justice Vaughan Williams said, "If this had been a case where the union men were refusing to work with a man who had been expelled from the union for disgraceful conduct, and in which the men were unwilling to work with Giblan, it is quite possible that there might have been a good defence; but this is not such a case. It is a case in which the union and its officers were acting independently of the men" (1903, 2 K. B., at p. 617). Lord Justice Romer mentions this fact (p. 619), but puts the liability of the union on the ground of the two officials being its agent; Lord Justice Stirling puts it solely on this ground. Ten years earlier (in *Temperton* v. *Russell*, 1893, 1 Q. B., at p. 731), Lord Justice Lopes had said, "It was contended that the damage to the plaintiff"—who supplied a firm with which a union was at variance, and whose customers had been induced by the defendants to break their contracts and not to enter into further contracts with him by threats that if they did their workmen would be called out—"must be considered as having arisen from the spontaneous action of the individual workmen themselves. I cannot think that that view is maintainable. We know something of the action of trade unions and their officials. So far from the injury to the plaintiff arising from the men acting of their own accord, I think it is clear that, if it had not been for the fear of the trade unions and of the consequences of breaking the compacts which they had entered into as members of the union, there would have been no question of the men withdrawing from their employ." And Lord Lindley says, "A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and,

to say the least, requiring justification" (*Quinn* v. *Leathem*, 1901, A. C. 538).

These passages clearly imply that the law will come between a union and its members; in other words, it will not identify them, but at the suit of third parties it will enquire whether in effect the union, in any given circumstances, fairly represents its members' wishes or not, in short, will pronounce upon its internal affairs. It may fairly be argued that it treats no other body on this principle, and that it does for non-members what it expressly prohibits—except in so far as it will grant an injunction (p. 61)—between members, viz. claims control over the internal affairs of a union. For by s. 4 of the 1871 Act it is enacted:—

"Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing, or recovering damages for the breach of, any of the following agreements, namely—

"1. Any agreement between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business,' employ or be employed."

Thus the men assumed to be coerced into striking have no remedy against the coercer, the union, but third persons, injured by their action, have.

Moreover, this doctrine is invoked in defence of the sanctity of contract (for in *Temperton* v. *Russell* the defendants were expressly held liable on the ground of inducing persons to break contracts). Yet, in the words of L.J. Lopes, the strikers were in "fear of the trade unions and of the consequences of *breaking the compacts which they had entered into as members of the union*." Why are *these* compacts not to be observed? Why should not those who enter into them be afraid to break them? It may be said, if they are tired of their compact with the union they can at once resign; their freedom of action is amply

protected by the law. It is true they may thereby lose their vested interest (or what would be "vested" if the law recognised it, which it does not, as s. 4 shows), but to this they agree when they make the compact originally, *i.e.* when they join the union. As Lord Esher, M.R., says (*ibid.*, p. 724): "The main condition upon which the members of the union are to be entitled to the benefits of membership is, that they will obey the directions given with regard to certain trade matters by the persons authorised by all of the members to give such directions. If they do not they may be deprived of the benefits to which they would otherwise have been entitled, or expelled from the union. Therefore the members of the union have given up their liberty of action in respect of certain matters, in the sense that they have bound themselves by agreement not to exercise it on pain of losing certain benefits," exactly as members of a club or any other association do. Why then, is it to be assumed that the group or person whom the members have collectively chosen to represent them, and to voice, as their phrase is, the feelings, do not correctly reflect and represent their wishes at any given moment, or —if the individual members have not given their attention to the particular matter—why should they not willingly acquiesce in their representatives' plan of action? And if there be a division of opinion, why is not the will of the majority to prevail as usual? If the individual loses prospective rights by seceding, he suffers only what he must have been prepared for, since he associated himself with his fellows. In short, differentiation between the union and its members strikes straight at the principle that the majority must govern.

(2) *Conspiracy between Individual Members of a Union.* —If the action is abolished altogether in trade disputes, this, of course, goes. S. 2 in the 1905 Bill (p. 39) is short of this, but, from its very terms, makes such an action unnecessary, for, under it, unless the individual can be

"hit" singly, he cannot be hit at all. Now, the only ground on which conspiracy has been defended as a cause of action, where the solitary wrong-doer could not be reached, is that numbers in themselves may in practice constitute the offence, or materially change it—that a difference in degree may be so great as to make a difference in kind. This theory was stated with great power by Lord Brampton and Lord Lindley in *Quinn* v. *Leathem* (1901, A. C., at p. 530 and p. 538). "Much consideration," says the former, "of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless, but a pound may be highly destructive, and the administration of one grain of a particular drug may be most beneficial as a medicine, but administered frequently and in larger quantities with a view to harm may be fatal as a poison."

"It is said," said Lord Lindley, "that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy both in its criminal and civil aspects; and older views have been greatly, and, if I may say so, most beneficially modified by the discussions and decisions in America and this country." In an American case "coercion by other means than violence or threats of it, was held unlawful. In this country it is now settled by the decision of this House in the *Mogul Case* that no action for a conspiracy lies against persons who act in concert to damage another, and do damage him, but who at the same time merely exercise their own

rights, and who infringe no rights of other people. *Allen* v. *Flood* emphasizes the same doctrine."

Now, it seems clear that these distinguished judges here have in their minds a picture of the union acting with all the force of their numbers—of thousands crushing a handful of dissentients. But this is totally inconsistent with the theory of the union as one, as an entity (p. 40), and with the actual facts of a strike. Sir W. Lewis, by the way, admits that non-unionist workmen are ten times as numerous as unionist (p. 123). When a union acts as an organism, *i.e.* through its limbs or agents, it does not work by thousands, but by a few, and, in most cases—to use the language of Lord Lindley—the "many do no more than one is supposed to do." Against intimidation or molestation of any sort, of any person obnoxious to a union, the law affords ample protection and has been, rightly, most severely administered, as we shall see. Against social boycotting the law, of course, is powerless, and it is difficult to see at what point numbers, as such, begin to oppress. With or without concert the obnoxious person, in times of excited feeling, is certain to be "sent to Coventry," or otherwise visited by the displeasure of his immediate neighbours, and, apart from social intercourse, it is not easy to see what these "many" can do within the law which one could not. Such cases, however, the present law does reach. Whether it is worth while to retain the action of conspiracy for small knots of unionists acting in concert on the ground that they in combination can do more damage to the boycotted person than each can do separately, or than all acting simultaneously without concert can do together, may be questioned. At any rate, the Trade Disputes Bill does not alter the law of conspiracy where each conspirator can be reached singly; the usual incidents of concerted boycotting in a trade dispute are the only ones which the present law does not reach in individuals, though in the state of feeling

commonly engendered in trade disputes exactly the same persons would probably be boycotted by exactly the same persons, with or without concerted action.

(3) *Conspiracy between Individual Members and Non-members.*—We are not aware of any actual case where this kind of confederacy has been alleged. S. 2 of the Bill would, of course, apply to it. In practice, such non-members would almost certainly be members of other unions, acting on an understanding with their union as such. Legislation seems hardly required in this connection.

(4) and (5) seem, also, to be of no practical importance, except in so far as has been mentioned under (3). Whether one union could conspire with another—if conspiracy remains in trade disputes—depends on the recognition of a union as a legal "person." A union of unions is known, but is itself a union: it is generally called a federation. The law as to the conspiracy of individuals is, we hope, sufficiently dealt with under (2).

Sir Godfrey Lushington, one of the Commissioners, after an exhaustive review of the whole subject, comes to the same conclusion as we do. He says—

"On a review of the whole matter, I am of opinion that no ground exists of public policy or justice to private interests, to make it necessary that in trade disputes conspiracy to injure should continue to be a cause of action" (p. 90).

Sir W. T. Lewis, on the other hand, is satisfied with the present state of the law (p. 131).

The majority Commissioners make a recommendation intermediate between these views, viz. that it should be enacted: "that an agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute, shall not be the ground of a civil action unless the agreement or combination is indictable as a conspiracy, notwithstanding the terms of the Conspiracy and Protection of Property Act, 1875."

In other words, there is to be no civil liability unless

there is criminal liability. Thus, there would be an invitation to every plaintiff successful in a civil court to proceed to a criminal prosecution. And it would be the province of the judge at the civil trial to rule whether the case set up could found a good indictment. To make civil liability depend on criminality is to encourage double proceedings and to make it very difficult for the judge at the second trial to say the first was wrong.

Moreover, concurrent civil and criminal punishment is little known to our law, and when it is, the usual order is first the criminal then the civil trial. Jurists, however, have proposed that such concurrent jurisdiction should be extended; it is normal in France.

As far back as 1891 Lord Coleridge (with the concurrence of a strong Court) said: "It is true where the object is injury, if the injury is effected, an action will lie for the malicious conspiracy which has effected it; and, therefore, it may be that such a conspiracy, if it could be proved in fact, would be indictable" (*Curran* v. *Treleaven*, 1891, 2 Q. B. 563).

Criminal Law of Conspiracy.

At this point we may call attention to a passage in the Commissioners' Report (p. 15) on the *criminal* law of conspiracy, though it is not strictly relevant to the question of civil liability, with which we are mainly concerned.

Part of s. 3 in the Act of 1875 runs: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime. . . .".

Now, in *Quinn* v. *Leathem*, Lord Lindley said, "I cannot myself see that there was in this case any trade dispute between employers and workmen within the meaning of s. 3. I am not at present prepared to say that the officers

of a trade union who create strife by calling out members of the union working for an employer with whom none of them have any dispute can invoke the benefit of this section, *even on an indictment for a conspiracy*" (1901, A. C. 541). And Lord Macnaghten affirms the first of these propositions. Further, the headnote to *Quinn* v. *Leathem* says, "The words 'trade dispute between employers and workmen' in s. 3 of the (1875) Act do not include a dispute on trade union matters between workmen who are members of a trade union and an employer of non-union workmen who refuses to employ members of a trade union. *Semble*, the words are restricted to disputes between an employer and *his own* workmen."

The Commissioners think that this interpretation of s. 3 fails to give effect to the intention of Parliament in 1875, and apparently seek by recommendations 2 (p. 37) and 4 (p. 31) to alter the effect of this part of the section. With these recommendations we agree, but we see no reason why the words of the section of 1875 should not be amended in accordance with their view. This would be simpler.

Thus, as to conspiracy, the alternatives are—

(*a*) To leave the law of conspiracy as it stands at the present moment. (It is admittedly in a very anomalous state. Lord Lindley's statement (p. 44) could be corroborated by many judicial dicta. The law, by the way, is almost exclusively applied to trade disputes and cases of political league in Ireland.)

(*b*) To abolish the action of conspiracy in trade disputes.

(*c*) To pass s. 2 of the Trade Disputes Bill.

(*d*) To adopt the Commissioners' (majority) recommendations.

It must be repeated that, so far as unions are concerned, the total immunity of their funds would make the loss of an action of conspiracy a matter of indifference to them as such. They might still, under s. 2, be legally capable of conspiracy so as to render another party to the conspiracy liable.

IV. Picketing.

The present law is contained in s. 7 of the Conspiracy and Protection of Property Act, 1875, and runs—

"Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,

"1. Uses violence to or intimidates such other person or his wife or children, or injures his property; or,

"2. Persistently follows such other person about from place to place; or,

"3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,

"4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or,

"5. Follows such other person with two or more other persons, in a disorderly manner, in or through any street or road,

shall, on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

"Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section."

There has been a great variety of cases on this section, illustrating the diversity of form which picketing in practice takes. A few may be cited.

In 1887 a boot manufacturer's shop in Leeds was picketed during a strike. Two men, "and no more," paraded opposite the premises in turns of two hours each, by order of the secretary of a union. It was proved that these pickets "were themselves orderly and well behaved, and did not personally interfere with the people going to and from the" premises, "but that owing to their presence a crowd of people, sometimes estimated at as many as from four to five hundred, assembled in a disorderly manner in the street near" the business, "rendering the entrance and exit of workmen to and from such place of business more difficult than under ordinary circumstances, and also rendering it necessary for the" manufacturer "to call in the aid of the police from a well-grounded fear of personal violence to such workmen from the assembled crowd" (*Judge* v. *Bennett*, 52 J. P. 247).

Proceedings were taken not for the picketing, but on account of a letter which the secretary had written to the manager of the business, to the effect that if the demands of the union were not complied with, the shop would be picketed: "Your men and the society," it said, "think that your action in sacking men because they are seen to speak to me is such that ought not to be tolerated. Therefore we wish to show you that others can have their way as much as you can have yours. If you are agreeable to take back all your hands, the matter is settled as far as we are concerned. If not, then we shall fight it out to the end." It was proved that this "excited fear in the mind" of the lady proprietor, and the magistrates convicted of intimidation. On an appeal, Mr. Justice Stephen suggested that the letter ought to have stated that the picketing would be lawful, and held that if the person threatened was "reasonably afraid," this was illegal intimidation. Mr. Justice A. L. Smith thought that the orderliness of the pickets did not prevent their conduct being an intimidation, and both upheld the conviction. This may seem a harsh case. It

was explained by Mr. Justice Mathew as seeming "merely to have decided that a threat to do something specifically prohibited by the statute, if it, in fact, intimidates, is intimidation" (*Gibson* v. *Lawson*, 1891, 2 Q. B. D. 550). There is no question as to the legality of informing an employer that his men will be called out in a certain event (*Curran* v. *Treleaven*, *ibid.*, and *Allen* v. *Flood*).

Probably, however, *Judge* v. *Bennett* is overruled by *Curran* and *Treleaven*, etc., for a headnote to these cases (55 J. P. 485) states: "Workmen, members of a union, complained of non-union men being employed by the same master. A secretary of the union, on behalf of the union men, gave notice to the employer that unless the non-union men were discharged, the union men would strike on a certain day. No violence or threat of violence, either to person or property, was used. But the non-union men had good reason to believe that they would get no other employment if discharged, and the employer had reasonable ground for expecting that violence would be used, and that great injury from the strike would result to him, and on that ground he dismissed the non-union men. *Held*, that as there was no threat of violence, there was no intimidation within the meaning of s. 7, and that the mere fact of the employer reasonably apprehending injury did not make the notice of strike actionable or indictable or criminal." This was the unanimous judgment of five judges, including A. L. Smith, J., who had been a party to *Judge* v. *Bennett*. The word "intimidate," said Lord Chief Justice Coleridge, "is of everyday use, and must be construed in each case according to circumstances," and he added that "there was much to be said for the view entertained by Mr. Justice Cave" (who was one of the five), "that intimidation in this Act must still be limited to threats of personal violence."

Judge v. *Bennett*, then, is now only instructive of the way magistrates may interpret the existing law of

picketing. The Commissioners, however, by their eighth proposal, recommend as a substitute for sub-sections 1 and 4 (p. 49): "acts in such a manner as to cause a reasonable apprehension in the mind of any person that violence will be used to him or his family or damage be done to his property." This seems to us, in effect, to restore the law as declared in *Judge* v. *Bennett*, and to be distinctly reactionary.

In *Charnock* v. *Court* (63 J. P. 456; 1899, 2 Ch. 38) "it appeared that in January, 1899, a strike commenced at Halifax amongst the journeymen carpenters there. In order to fill the places of the strikers, the masters took steps to import men from Belfast and other places. On January 20, 1899, nine men were sent through an agent of the masters by steamer from Belfast to Fleetwood, and thence by rail to Halifax. On February 21 thirteen other men were similarly sent, each of whom had signed an undertaking to work for twelve months upon certain terms, as a non-union man for the Masters' Union at Halifax. On the arrival of the nine men at Halifax they were met by the president of the men's union, who had some conversation with them about the strike, the result being that only two of the nine commenced work at Halifax. The thirteen men sent from Belfast on February 21 were met on the landing-stage at Fleetwood by emissaries of the men's union, named Walker and Wadsworth, who spoke to them about the strike, and informed them that if they would go to other places than Halifax their expenses would be paid and work found for them. Walker and Wadsworth also gave some of the men railway tickets to other places, and money for their night's lodging, such expenses being defrayed out of funds provided for the purpose by the secretary of the men's union. In consequence of this interference of the men's union, only four out of the thirteen workmen accepted work at Halifax." An injunction was granted, at the suit of the masters' union, restraining certain representative members of the men's union from thus

watching and besetting the places of arrival. Mr. Justice Stirling thought that the attendance of Walker and Wadsworth at Fleetwood was "compelling" the masters within this section, and was not only to obtain or give information. Inducing the men to go elsewhere was not permitted by the section. Moreover, these two men "watched . . . the place . . ." where the workmen "happened to be."

In 1890 there was a strike at Bolton. The works were picketed by amongst others one Smith. Thomasson, a "blackleg," came out, and was followed by a crowd of three or four hundred people, who shouted "knobsticks" and threw refuse. Smith followed Thomasson closely through several streets, but did not speak to him. He was fined for "persistently following." "It must be for the justices," said Baron Pollock, "to say in any given case whether the conduct of the defendant was in the nature of intimidation. . . . As far as intention can be inferred, we may look at what the people were doing at the same time. All the circumstances show the general object." "It is true," said Mr. Justice Hawkins, "the appellant did not speak to the respondent, but still, his conduct, taken along with the conduct of the crowd, supplied abundant evidence that he was persistently following" (*Smith* v. *Thomasson*, 54 J. P. 596).

Of quite a different type of case is *Lyons* v. *Wilkins*. In 1895 a trade union had ordered a strike against the plaintiffs, partly in order to obtain an increase of wages, and partly in order to put an end to the system of paying some persons by piece-work and some by time. The union picketed the plaintiffs' premises (60 J. P. 325). "The pickets were furnished with cards. These cards were headed" with the name of the union, and had on them, "Dear sir, you are hereby requested to abstain from taking work from Messrs. Lyons . . . pending a dispute. Members are also requested to use their influence to keep non-society men, stitchers and machinists, etc., from applying for work until

the dispute is settled." The pickets accosted persons entering and leaving the plaintiffs' premises, and gave them some of the cards. On one occasion they opened a bag carried by an errand boy who was taking goods to the plaintiffs, and on one or two occasions followed persons into the plaintiffs' works (1896, 1 Ch. 812). It was admitted that the pickets used no violence or intimidation or threats. The picketing lasted some months, during all working hours, and was conducted by relays (1896, 1 Ch. 270). In his judgment, North, J., said: "One of these statements [by a picket]—a workman who had been discharged—was 'Mr. Lyons has kept me stand cutting, and I have been the worm that he has trod on, and now the worm has turned round, and we will ruin the firm if they don't give in to us.' . . . The pickets were employed by the defendants to prevent persons from working for the plaintiffs. . . . What passed in conversation between persons employed as pickets and others is, in my opinion, part of the *res gestæ*, and is admissible in evidence, and the defendants"—the secretary and a member of the executive committee of the union—"cannot be held free from responsibility for the acts of the pickets they employed." The only injunction granted, however, was to prevent the defendants maliciously inducing or conspiring to induce persons not to enter into the employ of the plaintiffs (60 J. P. 325). The Court of Appeal confirmed this decision: "It is easy to see," said Lindley, L.J., "how under colour of attending" at or near a house in order merely to obtain or communicate information "a great deal may be done which is absolutely illegal. It would be wrong to post people about a place of business or a house under pretence of merely obtaining or communicating information, if the object and effect were to compel the person so picketed not to do that which he has a perfect right to do, and it is because this proviso is often abused and used for an illegal purpose that such disputes

as these very often arise" (1896, 1 Ch. 825); and he held that in this case the picketing had gone too far. Kay, L.J., laid it down distinctly that it was illegal for pickets to try and persuade workmen not to work for an employer (*ibid.*, 830). The Court extended the injunction to the same kind of picketing of the shop of a sub-manufacturer who supplied the plaintiffs.

Later there was a new development when this case came on for final trial in 1897. The doctrine of "nuisance" was imported. By that time *Allen* v. *Flood* had been decided. The injunction against the picketing was made perpetual, but that against inducing workmen not to enter into contracts was not renewed. The Court of Appeal did not disturb this decision; they were not asked to, in respect of the injunction refused, but Lindley, M.R., and Chitty, L.J., added that "watching and besetting," which was punishable under s. 7, was also a nuisance actionable at common law, "because it was an annoyance of a serious character and of a degree to interfere with the ordinary comforts of life." Lord Lindley repeats this (*Quinn* v. *Leathem*, 1901, A. C., at p. 541), "if damage results." L.J. Vaughan Williams thought that the invitation to the men to discontinue working for the master "as soon as they lawfully may" was *not* outside the category of a communication, and did *not* take it out of the legalising proviso. But persuasion, even if not a nuisance, must not take any other shape than that of communication; but even in such a shape it might be a nuisance, though he did not think it was in this case.

Finally, in a case recently reported (*Wallis & Co.* v. *United French Polishers*, etc., *Times* newspaper, November 28, 1905), there was a trade dispute between a firm (Wallis's) and some workmen. The latter being dismissed, their union picketed their premises with two or more men, on whose hats were cards with the words "Pickets," and a statement that the firm's French polishers were "on strike

against a reduction of 1*d.* an hour in their wage." It was admitted that they spoke to no one entering or leaving, and did nothing else than patrol; but the employers said that what they did was a nuisance and annoyance to them. An injunction was granted against their watching or besetting, except in order to give or receive information, and the Court of Appeal refused to disturb it.

In the light of these cases, especially of *Wallis's* case, it would seem that under the present law any form of picketing whatever is illegal, if the employer can only make out that it is a nuisance or an annoyance to him—a view which he will naturally always be prone to take. Peaceful patrolling is evidently not enough to protect the pickets, and the merest word from a picket not strictly of a narrative character, any utterance with a tinge of argument or reproach, may be construed as an infringement of the proviso in s. 7: even peaceable persuasion is not within the grace of that enactment. It may be right to discourage strikes; at any rate, it is obvious that, if they are legal, the law ought to be clear as to those incidents without which they cannot be carried on.

We may now turn to the proposals of the 1905 Bill on this head. S. 1 runs—

Legalisation of peaceful picketing.

"It shall be lawful for any person or persons acting either on their own behalf or on behalf of a trade union or other association of individuals, registered or unregistered, in contemplation of or during the continuance of any trade dispute, to attend for any of the following purposes at or near a house or place where a person resides or works, or carries on his business, or happens to be—

"(1) for the purpose of peacefully obtaining or communicating information;

"(2) for the purpose of peacefully persuading any person to work or abstain from working."

In 1905 the Standing Committee on Law, etc., added these words: "Provided that no person shall, after being requested by any person annoyed by his conduct, or by

any constable instructed by such person, to move away, so act as wilfully to obstruct, insult, or annoy such person." This addition seems to us to make picketing impossible.

This section reappears word for word in the Bill of Sir Charles Dilke and Mr. Keir Hardie this session (1906).

First of all, it must be noticed that the proposed sections deal only with trade disputes, whereas s. 7 of the Act applies generally, is "*not* confined to trade disputes" (Chitty, L.J.: 1891, 1 Ch. 272). It is not proposed in the Bills otherwise to affect s. 7 which will thus afford, as it always has been found to afford, ample protection from menaces, violence, and any form of intimidation or nuisance. Peaceful communication is already legal, so that the only concession here sought is what is known as the right of peaceful persuasion, which we prefer to call legal persuasion. Lord Lindley distinctly says, "persons may be peaceably persuaded, provided the method employed is not a nuisance to other people" (1899, 1 Ch. 268 and 269)—apparently he means under the general law, for s. 7 certainly does not authorise even peaceable persuasion by pickets. The same judge thought that, perhaps, in *Allen* v. *Flood* there was nothing more than peaceable persuasion (1901, A. C. 538)—whereas of *Quinn* v. *Leathem* (*ibid.*) he says, "What may begin as peaceable persuasion may easily become, and in trade union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded."

It must be manifest then, that if the right of peaceable persuasion can be granted with safety to the rights of dissentients, it ought not to be denied to trade unionists any more than it is to any one else in everyday life, and notably in the matter of canvassing in political controversies, where, too, feeling often runs high. The law has certainly not erred on the side of leniency in dealing with allegations against pickets, and if peaceable persuasion by them is legalised, there need be no fear that it would not

deal strongly with individuals who overstepped the proper limits of orderly canvass.

Suggestion.

As an additional safeguard, we would suggest that (1) the number of pickets should be limited in proportion to the number of hands usually employed in the shop or works (say, three per hundred, with a maximum of twenty); and (2) that the names and addresses, certified by the union or a branch, should be registered, with or without the payment of a small fee, by a justice of the peace, on an application to his clerk; any other picket to be liable to a fine. We believe that this would deepen the union's sense of responsibility in the conduct of a trade dispute, and ensure the appointment of steady and trustworthy members as pickets. There would certainly be fewer breaches of the peace.

V. Black Lists.

"Black lists," said Lord Lindley (*Quinn* v. *Leathem*, 1901, A. C., at p. 538), "are real instruments of coercion, as every man whose name is on one soon discovers to his cost." In that case damages had been given on account of a list, published by the union, containing the names of tradesmen who had dealings with the "boycotted" plaintiff, and holding him and them up to odium (*ibid.*, p. 518); one was induced not to deal with him, whereupon his name was removed.

Now, it is a curious fact that—so far as we know—"black lists" published by workmen have always been held actionable, whilst actions against masters for black lists or their equivalent have always failed.

In *Trollope's* case (p. 11) damages were given the employers for such a list in the form of a poster containing the names and addresses of non-union men, and of those who had not come out on strike; the jury found that the list was not published *bona fide* to protect the interests

of the union, and that it injured the employers' firm, but not the workmen, who were suing.

On the other hand, in 1892, Jenkinson, a workman, brought an action against the president of a branch of a union of master tailors which had put him on a black list, "asking the master tailors of Great Britain not to employ any of the men who were locked out from certain tailoring firms in connection with" a recent strike. The list had been circulated by agreement among members of the branch not to employ members of the Amalgamated Society of Journeymen Tailors until they acceded to the masters' terms; Jenkinson had in consequence been refused work. His action was said to be "a novel form." But, "in the absence of any desire to injure the plaintiff," said Mr. Justice Matthew and Mr. Justice A. L. Smith, "no action would lie." The *Mogul Case* was in point (*Jenkinson* v. *Nield*, 8 T. L. R. 540).

In 1902 a workman appealed against a masters' union in much the same circumstances as the last case (*Bulcock* v. *St. Anne's Master Builders' Federation and others*, 19 T. L. R. 27), except that Bulcock was actually in work at one of the federated employers': he was paid off and discharged. The strike had taken place in 1900. Three judges held that he could not recover on precisely the same grounds as those in the last case. In this case, indeed, no "black list" was made public, but one was evidently kept and used against the plaintiff.

VI. Other Recommendations.

We must now deal with other recommendations of the Commissioners.

(1) That an Act should declare "Trade Unions legal associations."

It will be seen (p. 61) that this must be taken in connection with recommendation 7.

If this recommendation means that for *all purposes whatever* a union is to be a legal *person*, we have dealt with

one large aspect of it (p. 12) in connection with the *Taff Vale* case. Such an enactment would, of course, dispose at once of the legislation of 1871–6, which deliberately proceeded on the theory of *not* legalising trade unions—and that with the full consent, or rather at the earnest wish, of the unionists (p. 7). There is no reason to suppose that they have changed their attitude, except in so far as the Bill of 1905 indicates their present desires. Perhaps the chief legislative result of the theory of 1871 was the much discussed s. 4 of the Act, which runs—

"Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing, or recovering damages for, the breach of, any of the following agreements, namely—

"1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed :

"2. Any agreement for the payment by any person of any subscription or penalty to a trade union :

"3. Any agreement for the application of the funds of a trade union :

"(*a.*) To provide benefits to members ; or,

"(*b.*) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union ; or,

"(*c.*) To discharge any fine imposed upon any person by sentence of a court of justice ; or,

"4. Any agreement made between one trade union or another ; or,

"5. Any bond to secure the performance of any of the above-mentioned agreements.

"But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

Broadly, the effect of this section has been to prevent the courts of law taking cognisance of the internal

affairs of the union, thus driving members for the settlement of such matters to whatever domestic tribunal they may choose to set up. (Criminal offences against the common property are adequately dealt with by another section.)

But a series of decisions has made one important exception to this rule, viz. that any member may in a proper case obtain an injunction against the union to prevent any application of its funds contrary to the rules, *e.g.* for strike pay. In *Howden's Case* (1905, A. C. 286) the House of Lords decided that this section did not prohibit any such injunction being granted.

It is obvious that actions for injunctions put a dangerous weapon into the hands of any dissentient member, who may be unfriendly to the policy of the union, and who may be—as Howden admitted he was—maintained in his action by the employers aimed at. Such actions may clearly entail expense on the unions which, even if they are successful, they cannot recover (though they themselves sometimes encourage their members to do acts for which these members would, if sued to judgment, be unable to pay damages).

Now on this point the commissioners make a specific recommendation (7), which must be taken in connection with their first (p. 59); it runs: that an act should be passed—

"7. To provide that facultative powers be given to trade unions, either (*a*) to become incorporated subject to proper conditions, or (*b*) to exclude the operation of s. 4 of the Trade Union Act, 1871, or of some one or more of its sub-sections, so as to allow trade unions to enter into enforceable agreements with other persons and their own members."

This seems to us merely to indicate a method of carrying out recommendation (1). Neither conclusion is argued by the commissioners, though it may fairly be said that the two opposite views of *fundamental policy* for unions as discussed, *passim* in the Report, and specifically on recommendation (7), it is said that it was urged "from no

unfriendly point of view to trade unions that it would be of great advantage that trade unions should be able to enter into binding agreements with associations of employers, and with their own members to enable them to carry out their agreements."

The unions certainly do not take this view, and it seems to us unreasonable to discuss reactionary legislation at a moment when it is understood that the present Government—as the late Parliament did—is endeavouring to meet the views of unionists, as far as they can compatibly with their public duty. Many persons may feel unable to go the length of total immunity of the funds, but total legalisation is at the very antipodes of total immunity. It only remains to add that if the action for an injunction is considered a grievance, it could be redressed by striking out the word "directly" in s. 4 (p. 60), a point sometimes alluded to in judicial criticisms.

VII. Separation of Funds.

The Commissioners recommend legislation—

"To provide for the facultative separation of the proper benefit funds of trade unions, such separation, if effected, to carry immunity from these funds being taken in execution." From this Sir Godfrey Lushington and Sir Thomas Lewis, dissent.

The Bill of 1905 was amended in the Standing Committee by the addition to s. 2 of the words:—

"Provided always that no funds of a trade union allocated solely for benevolent or charitable purposes shall be made liable for damages for acts done in furtherance of trade disputes only." The Bill of 1906 has no similar provision.

These proposals obviously fall short of total immunity. As the Commissioners only propose to give the unions an option, the suggestion is of little practical importance, for it is certain that no union would avail itself of such a power. The question was thoroughly discussed by the Commission of 1869. The majority report, "We should have thought

it desirable, had it been practicable, that the two kinds of unions—the unions for benefit purposes and the unions for trade purposes—should be kept quite separate" (Report, p. xxv.); and they proceed to suggest the separation of the funds for the two distinct objects, but nothing came of the suggestion. Messrs. T. Hughes and F. Harrison, however, give very strong reasons against any such plan (pp. lx.–lxi.), and to this the reader must be referred (see p. 5).

Conclusion.

We may now sum up the results of the foregoing discussion in the form of a list of suggestions which, we believe, include the chief that have been put forward by others as well as ourselves. Some of them are obviously alternative.

1. Total immunity of trade-union funds from (*a*) actions of tort, (*b*) all actions.

The words of s. 3 of the 1905 Bill, and of s. 3 of the 1906 Bill, imply immunity from all actions, without, perhaps, intending to do so.

As to actions of tort, see p. 23.

2. To declare trade unions legal associations.

(Report.) See p. 59.

3. To abolish the law of conspiracy in trade disputes.

See p. 40.

4. No civil action of conspiracy in trade dispute where no indictment would lie.

(Report.) See p. 46.

5. Trade dispute to include secondary or sympathetic strikes, and not to be confined to an employer and *his own* workmen.

See p. 38 and p. 48.

6. To define the law of Agency as applicable to Trade Unions; authority only to be assumed in and derivable from certain specified officials who must be registered.

See p. 18.

Alternatively the Union funds not to be liable for any acts or defaults *ultra vires* the Rules and Regulations.

See p. 20.

7. Inducing or procuring breach of contracts whether

in existence or contemplated (by means not criminal), in view of a trade dispute to be legal.

See pp. 30–39.

8. (*a*) To limit the number of pickets in proportion to the number of hands employed on the picketed premises ; only registered pickets to be recognised.

See p. 58.

(*b*) Picketing, not to constitute watching or besetting (within s. 7 of the Act of 1875), and not to be actionable or indictable as a nuisance, provided the only objects are :—

i. obtaining or giving information ;

ii. procuring (by means not criminal) any person to cease from or to refuse to take work.

See p. 56.

9. Employers during or in contemplation of a trade dispute engaging workmen, to disclose fact that there is a trade dispute in progress or contemplated ; otherwise such contracts to be voidable within a certain time, and employer to be liable to expenses incurred.

See p. 39.

10. Individual or union not to be liable for doing any act not in itself an actionable tort, only on the ground that it is an interference with another person's will, trade, business, or employment.

(Report, with additions.) See p. 31.

11. To amend s. 4 of the Act of 1871 so that agreements therein mentioned shall not be directly *or indirectly* enforceable by any Court.

See p. 62.

12. Unregistered unions to deposit with Registrar names of persons in whom the union funds are vested.

See p. 12.

It is by no means clear how otherwise the funds of such unions could be reached under a judgment.

In conclusion, we desire to remind the reader that we only recommend such of these suggestions as we have definitely advocated in the preceding pages.

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